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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 555

Case No. 587: SELAMAWIT MAKONNEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Mikuin Leliel Balanda;

Whereas at the request of Ms. Selamawit Makonnen, a former staff member of the Economic Commission for Africa, hereinafter referred to as ECA, the President of the Tribunal, with the agreement of the Respondent, extended until 15 March 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 March 1991, the Applicant filed an application containing the following pleas:

"II. Pleas

Applicant contests the decision rendered by the Joint Appeals Board on 16 May 1990, under article 9, paragraph 1, of the Statute.

Applicant wants to be reinstated to her post; or, if and only if that is impossible, to an equivalent post elsewhere; plus medical and salary compensation, retroactive to 31 March 1988 (...)."

Whereas the Respondent filed his answer on 28 May 1991;

Whereas the Applicant filed written observations on 2 July 1991;

Whereas, on 15 May 1992, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 2 June 1992, the Applicant submitted an additional document;

Whereas, on 10 June 1992, the Tribunal put questions to the Respondent, to which the latter replied on 11 June 1992;

Whereas, on 15 June 1992, the Applicant filed observations on the Respondent's reply;

Whereas the facts in the case are as follows:

The Applicant entered the service of ECA at Addis Ababa, Ethiopia, on 13 November 1961. She served initially on a short-term appointment as a Puncher/Verifier at the G-5 level. She received a probationary appointment on 13 December 1961 and a permanent appointment on 1 March 1974. The Applicant was promoted to the G-7 level on 1 December 1978, with the functional title of Senior English Typist. At the time of the events that gave rise to the present proceedings, the Applicant was working in the ECA International Trade and Finance Division.

In May 1987, the United Nations Medical Director, upon the recommendation of the ECA Chief Medical Officer, authorized the Applicant's medical evacuation to Nairobi for 15 days to undergo a series of medical tests unavailable at her duty station, for the purpose of diagnosing the cause of the Applicant's long-standing migraine headaches.

The Applicant decided, however, to travel to the United States of America, rather than to Nairobi, for medical treatment and paid the difference in air fare herself. She left Addis Ababa on 24 August 1987.

On 18 September 1987, the Applicant reported to the United Nations Medical Director at New York. According to him, at their meeting he reminded the Applicant that she had already exhausted her approved sick leave of two weeks and noted that his approval of her medical evacuation had been for the purpose of conducting specific tests not available in Addis Ababa and to "rule out serious reasons for her headaches".

During October 1987, the Medical Service received three medical reports concerning the Applicant. The first report was prepared by the Chairman of the Department of Medicine at the Medical Centre in Princeton, who concluded that the Applicant "probably [had] atypical vascular headaches", but as she had many dental problems, he was proposing a "course of restorative dental

treatment which might take six months". The other two reports, from a dentist in New Jersey, described the required dental care, indicating that the treatment would take six months.

On 19 October 1987, the Applicant was examined by the Deputy Medical Director, who referred her to the Montefiore Hospital Headache Clinic. She also referred the Applicant to another physician for a second opinion. He, in turn, referred her to the School of Dental and Oral Surgery at Columbia University.

In the meantime, on 27 October 1987, the Director, International Trade and Finance Division, ECA, wrote to the Chief of Personnel, ECA, informing him that the Applicant had not reported for work on 1 October as expected.

On 4 November 1987, the United Nations Medical Director saw the Applicant again at Headquarters. He advised her that he could not approve sick leave beyond that date since "adequate time had been given for her to see various specialists" and "she had also had the opportunity to receive essential dental care" which might not be easily available in Addis Ababa. On 5 November 1987, the United Nations Medical Director conveyed to the Chief Medical Officer, ECA, the substance of his conversation with the Applicant and stated that although the Applicant wished to remain in the United States for dental care, she was "not sufficiently disabled" to be considered on sick leave.

In a letter dated 9 November 1987, the Applicant asked the Chief, Administration and Conference Services Division, ECA, for an extension of her sick leave, as well as for financial support to help her meet the costs of her medical treatment.

On 19 November 1987, the Chief, Personnel Section, ECA, asked the Regional Commissions Liaison Office at Headquarters to notify the Applicant that she report to duty forthwith. The United Nations Medical Director, having confirmed that sick leave had been approved through 4 November 1987 only, warned her that any absences after that date would be considered unauthorized.

On 2 December 1987, the Chief, Personnel Section, ECA, informed the Liaison Officer and the Office of Personnel Services at Headquarters that ECA was unable to accede to the Applicant's request to extend her sick leave and to grant her financial assistance. The Applicant should therefore be informed that if she did not resume her duties immediately, her absence after

4 November 1987, would be considered unauthorized. If she did not report back for duty by 14 December 1987, ECA would consider that she had abandoned her post.

On 11 December 1987, the Applicant sought reconsideration of the decision not to extend her sick leave and not to grant her financial assistance. Alternatively, the Applicant asked for special leave without pay for six months. On 29 December 1987, the Chief, Personnel Section, ECA, advised the Applicant that ECA would not approve her request for special leave without pay. Accordingly, her name had been removed from the payroll, retroactively as of 5 November 1987. Unless she reported for duty by 11 January 1988, action would be taken to separate her for abandonment of post.

On 13 January 1988, the Chief, Administration and Conference Services Division, ECA, informed the Office of Personnel Services at Headquarters that ECA had, for humanitarian reasons, agreed, at the Applicant's request, to extend the Applicant's annual leave from 5 November 1987 to 28 December 1987. A new deadline of 20 January 1988 was set for her to report for work. If she failed to do so by that date, procedures would be initiated for her separation for abandonment of post.

In a reply dated 18 January 1988, the Personnel Officer at Headquarters, at the request of the Applicant, informed ECA that the Applicant would be unable to return to Addis Ababa on 20 January 1988, because she was undergoing further medical tests, of which the last would be conducted on 23 March 1988. Despite having been made aware of the serious consequences of missing the deadline, the Applicant stated that "there was nothing she [could] do since she must undergo the tests and await results".

On 25 January 1988, ECA sought Headquarters authorization to separate the Applicant for abandonment of post, effective 28 December 1987. On 5 February 1988, a Personnel Officer at Headquarters wrote to the Applicant confirming their telephone conversation earlier that day, when she had informed the Applicant that ECA had recommended her separation from the Organization for abandonment of post. She urged the Applicant to report to Addis Ababa immediately and warned her that unless she documented her intent to return to ECA by 17 February 1988, the Office of Human Resources Management* (OHRM) would have no alternative but to separate her from service for abandonment of post.

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* Successor of the Office of Personnel Services

In her reply dated 10 February 1988, the Applicant stated, inter alia, that she "never wanted nor had any intention of abandoning" her post in ECA but that she must complete her medical treatment before returning to Addis Ababa. She therefore requested ECA to grant her one year's special leave without pay. In a letter dated 12 February 1988, the Personnel Officer rejected the Applicant's request and reiterated that ECA's recommendation to separate her from the Organization for abandonment of post would be approved unless the Applicant gave notice by 22 February 1988, of her intention to return to ECA immediately. According to the record of the case, the Applicant did not reply to this communication.

On 23 March 1988, the Assistant Secretary-General for Human Resources Management approved ECA's recommendation to separate the Applicant from the Organization for abandonment of post, effective 28 December 1987. In a letter dated 25 March 1988, the Personnel Officer conveyed this decision to the Applicant.

In a memorandum dated 30 March 1988, the United Nations Medical Director, who had reviewed the case following the Staff Council's intervention, suggested to the Assistant Secretary-General, OHRM, that the Applicant's request for special leave without pay until 31 May 1988 be reconsidered. He noted that although 10 weeks' sick leave "should have been sufficient" to undergo "the required neurological investigations", the Applicant "may have been ill-advised, and even confused, by her contacts with various medical and dental colleagues". He reiterated that as "mentioned earlier [he] had been in favour of special leave without pay" and had suggested that the Applicant's request might be reconsidered "in view of her extensive UN service".

In a Note for the File dated 27 April 1988, the Assistant Secretary-General, OHRM, noted that given the history and background of the Applicant's case, it was difficult to conclude that she "[would] indeed return to ECA at the end of her treatment". Consequently, he did not approve the United Nations Medical Director's recommendation, but indicated that he was prepared to reconsider the matter if the Applicant returned to Addis Ababa.

On 25 May 1988, the Applicant requested review of the administrative decision to separate her from the Organization for abandonment of post. In a reply dated 29 July 1988, the Assistant Secretary-General, OHRM, informed the Applicant that the decision would be maintained.

On 7 September 1988, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 16 May 1990. The conclusions and recommendation from the majority of the Panel read as follows:

"Conclusions and recommendation

63. The majority of the Panel concludes that:

- the Administration's discretion not to grant the appellant SLWOP [special leave without pay] was properly exercised,

- the appellant abandoned her post when she absented herself from work from 28 December 1987 to 23 March 1988 without authorization and justification, despite the Administration's repeated requests that she return to duty,

- the Respondent's decision to separate the appellant from service for abandonment of post was not improperly taken.

64. Accordingly, the majority of the Panel makes no recommendation in support of this appeal."

In a dissenting opinion, the Member of the Panel elected by the staff stated as follows:

"...

2. On account of the misunderstanding on the part of the Office of Human Resources Management, which resulted in an unintended confusion on the part of both the appellant and the Administration, a request for SLWOP was submitted at a later date than it should have been.

3. Since the requested extension of sick leave was denied in November 1987, the appellant had no other option but to request SLWOP.

4. At that point, OHRM should have insisted that ECA grant the appellant SLWOP immediately, instead of giving her a series of deadlines to return to duty.

5. SLWOP is frequently granted to staff members in this Organization for the purpose of taking care of an ailing relative or for the purpose of travelling with a reassigned spouse. In many cases, SLWOP may be renewed on a yearly basis and posts remain blocked until the staff member's return.

6. No fault rests on the part of the United Nations Medical Service in this case. Although they did not feel that the appellant qualified for additional sick leave, they did later recommend that she be granted SLWOP.

7. The denial of SLWOP did not constitute a valid exercise of the discretionary authority provided under staff rule 105.2 in view of the precedent established in granting SLWOP to other staff members with less stringent reasons than that of the appellant. Consequently, the refusal of the appellant to return to duty, after the denial of SLWOP, should not work to her detriment.

8. I therefore recommend that the appellant be reinstated."

On 22 May 1990, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the report of the JAB and informed her that the Secretary-General, having reviewed her case in the light of the JAB report, had decided to maintain the contested decision.

On 15 March 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant intended to return to her post in Addis Ababa.

2. The Respondent improperly exercised his discretion in not granting the Applicant special leave without pay.

Whereas the Respondent's principal contentions are:

1. The Medical Director determines the fitness for work of staff members and approves their sick leave on behalf of the Secretary-General.

2. The Respondent properly exercised his discretion in not granting the Applicant SLWOP.

3. Unauthorized absence from work, following notice to report for duty, constitutes unilateral breach of the contract of employment and thus abandonment of post warranting separation from service.

The Tribunal, having deliberated from 4 to 25 June 1992, now pronounces the following judgement:

I. It is incumbent on the Tribunal in the present case to determine whether the conclusion of the Joint Appeals Board in its report dated 16 May 1990, to the effect that the Applicant abandoned her post, is sound.

The Tribunal also has to determine whether the Administration's refusal to grant the Applicant special leave without pay has any implication for this abandonment of post if the latter should be established.

II. Termination for abandonment of post is not explicitly provided for in the Staff Rules. However, annex III, paragraph (d), to the Staff Regulations provides that "no [termination] indemnity payments shall be made to ... a staff member who abandons his or her post". Staff rule 109.5(i) stipulates that "no [repatriation grant] payments shall be made ... to a staff member who abandons his or her post". The Tribunal recalls the precedent set by its Judgement No. 174, Dupuy (1973), para. VII, in which the following principle is enunciated: "The prohibition against paying termination indemnity to a staff member who abandons his post would be meaningless if abandonment of post was not a distinct and independent reason for termination".

III. In its Judgement No. 380, Alam (1987), para. VI, the Tribunal considered that abandonment of post derives from the staff member's conduct, regardless of his or her expressed or unexpressed intent. Abandonment of post is therefore an objective notion. In the Alam case, the Tribunal considered that several refusals to return to work despite orders by the Administration to do so, constituted abandonment of post, justifying termination. In its Judgement No. 265, Kennedy (1980), para. X, the Tribunal held that, after having instructed the Applicant to return to work by a certain date, the Secretary-General could decide to consider the Applicant's failure to do so as a repudiation of contract.

IV. In the present case, it is not contested that the Applicant went to the United States at the end of August 1987, for medical treatment. In addition to her annual leave, she was granted, retroactively, eight weeks of sick

leave. Also, she was given two weeks leave in respect of the medical evacuation initially approved when she decided to go to Nairobi. However, since she had not been granted further sick leave, her absence from Addis Ababa, her duty station, was unauthorized, as from 28 December 1987. It is equally clear that the Applicant did not return to Addis Ababa, even after several postponements of the date on which she was to return and despite warnings to the effect that her continued absence would lead to her termination on the ground of abandonment of post. From her application, it would seem that she may actually still be in the United States.

V. The unauthorized absence of the Applicant after numerous warnings, constitutes in law a unilateral breach of the contract of employment and abandonment of post, justifying termination.

VI. It is conceivable that, since the Applicant was not on sick leave as from 28 December 1987, she might have been granted special leave without pay, but though she requested it, no such leave was granted. According to the Tribunal's jurisprudence "a grant of SLWOP [special leave without pay] for medical reasons is not a right of the staff member, but is within the discretionary authority of the Secretary-General" (cf. Judgement No. 422, Sawhney (1988), para. VIII). In the circumstances of the case, it does not appear that the refusal to grant the Applicant special leave without pay was prompted by discriminatory motives or based on considerations other than the requirements of service.

VII. The Tribunal nevertheless considers that the decision not to grant the Applicant special leave without pay may be regarded, in point of fact and irrespective of any legal consideration, as regrettable, in view of the Applicant's state of health and in particular because, at the time when her request was submitted, the Applicant had been employed by the Organization since 1961, i.e., for 26 years. Moreover, it appears that the Applicant's request for special leave without pay was based on the advice she had been given by the UN Medical Director at Headquarters.

VIII. The Applicant, in a communication to the Tribunal dated 2 June 1992, alleges that the Administration has still not paid her the per diem to which she was entitled at the time of her medical evacuation and that she has "not yet received what is rightfully [her] compensation under the Staff Rules". She further claims that the medical insurance has, wrongly, refunded to her only part of the medical expenses she has incurred. The Tribunal notes that, as these questions were not raised before the Joint Appeals Board, the Tribunal cannot consider them. The Tribunal, nevertheless, expresses the hope that the Administration will pay particular attention to these claims.

IX. The Tribunal further expresses the hope that, in view of the circumstances, should the Applicant return to Addis Ababa and submit, within 45 days of notification to her of this Judgement, an application for employment in a post for which she is fully qualified, the Administration will give it favourable consideration.

X. For the above reasons the Tribunal rejects the application.

(Signatures)

Jerome ACKERMAN
President

Mikiun Leliel BALANDA
Member

Hubert THIERRY
Member

Geneva, 26 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary